IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 584 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

P.K.THOMUS

Versus

DHIMANTKUMAR KANTILAL SHAH

Appearance:

MR AJ DESAI for Petitioner Nos. 1-2

MR MC BHATT for Petitioner Nos. 1-2

RULE SERVED for the Respondent.

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 11/03/2004

ORAL JUDGEMENT

1. The present revision application is directed against the judgment and decree, dated 19.3.1991, passed by the Assistant Judge, Surendranagar, in Regular Civil Appeal No.31 of 1986, by which the appellate Judge has allowed the appeal filed by the respondent-plaintiff and decreed the suit of the plaintiff for possession.

2. The respondent is the original plaintiff of Civil Suit No.102 of 1982, which was filed before the Civil Judge (Junior Division), Surendranagar. The case of the plaintiff is that the plaintiff is the owner of two shops situated opposite M.P. Shah Arts and Science College in the City of Surendranagar. The shops are described as "Shop Nos. 9 and 10". It is the say of the plaintiff that, out of the aforesaid two shops, Shop No.10 was let out to defendant No.1 at the rate of Rs.35/- per month for the purpose of the business of defendant No.1 and Shop No.9 was let out to defendant No.2 for his business. In the present revision application, we are concerned with the dispute in connection with Shop No.10, which, according to the plaintiff, was let out to defendant No.1. The case of the plaintiff is that defendant No.1 has not paid rent from 1.10.1981 till 31.1.1982 and even though notice was served, he has sent the amount of rent with certain objections. It is also the case of the plaintiff that even though the shop in question was let out to defendant No.1 for his business, he is not using the same and he has handed over possession to his brother defendant No.2 by way of sub-tenancy. The suit, therefore, was filed for getting possession on the aforesaid two grounds, viz., arrears of rent as well as sub-letting. Additional ground was also pleaded in the plaint that defendant No.1 has closed his business and allowed defendant No.2 to use the suit premises for tyre moulding business and, therefore, there is a change of user regarding the use of the suit property.

3. The said suit was resisted by the defendants, by filing Written Statement, by contending that there is no sub-letting. It is also the case of the defendant that, both the defendants are brothers and that, therefore, there is no question of sub-letting between them. It is also the case of the defendants that both the brothers are doing business jointly. On these and other grounds, the suit was resisted by the defendants.

4. The learned trial Judge, after recording the evidence, came to the conclusion that the plaintiff has failed to prove his case about non-user of the suit property. The trial court also found that the plaintiff has failed to prove the case about sub-lettting. The trial court, ultimately, by its judgment and order dated 31st January, 1986, dismissed the said suit.

5. Aggrieved by the judgment and order of the trial court, the respondent-landlord preferred an appeal, being Regular Civil Appeal No.31 of 1986. The appellate court, by giving the reasoning in two paragraphs, viz.,

paragraphs 10 and 11, allowed the said appeal and decreed the suit of the plaintiff for possession on the aforesaid ground of sub-letting. It is the aforesaid order of the appellate court, which is impugned in the present revision application at the instance of the original defendants.

6. The present revision is filed under Section 29(2) of the Bombay Rent Act.

On going through the judgment of the appellate court, in my view, the appellate court has seriously erred in not discussing the oral evidence on record, in detail. The trial court has given various reasons for negativing the claim of the plaintiff for getting decree for possession on the ground of sub-letting. There is a specific finding of the trial court, after considering the evidence on record, to the effect that the trial court has considered the evidence of the plaintiff and his witnesses. In paragraph 12, the trial court has observed that witness Muljibhai Becharbhai, who was examined by the plaintiff at Exhibit 43, has stated in his evidence that he is not aware as to for what purpose the premises was taken by the defendants and, subsequently, he has changed his version by stating that it was taken for office purpose. The said witness has also stated that in a Rent Note regarding Shop No.10 (which is the disputed shop), defendant No.2, P.K. Joseph, has signed and that said Mr.Joseph is the tenant of Shop No.9. He has clearly stated that, both the said shops are adjoining to each other and the rent Note regarding both the two shops was executed on the same day, and even the rent is paid by defendant No.2, which comprises of rent of both the shops. The trial Judge has also observed in paragraph 12 of his judgment that even the rent receipt is given to defendant No.2. It has also been observed by the trial court, after considering the evidence on record, that there is a common Board, which is exhibited on the aforesaid shops. In paragraphs 12 and 13, the trial court has considered, in detail, the oral evidence adduced on behalf of the plaintiff's witness.

The trial court, after considering the evidence on record, therefore, came to the conclusion that the plaintiff has failed in the case about sub-letting. The trial court, therefore, came to the conclusion that, it cannot be said that defendant No.1 has sub-let the suit premises to defendant No.2. The trial court has also considered the fact that while executing the rent note, the signature of defendant No.1 was not taken. A

specific finding is given by the trial court that, from the beginning, both the defendants are jointly doing their business of tyre repairing in Shop Nos. 9 and 10. On appreciation of the evidence, therefore, the trial court negatived the claim of the plaintiff for getting decree for possession on the ground of sub-letting.

7. The appellate court, while reversing the said decree of the trial court, has come to the conclusion that as per the rent note at Exhibits 53 and 54, the suit shop was let out to defendant No.1 and shop No.9 was let out to defendant No.2 and that both of them have taken the premises separately by different rent notes and they are paying the rent separately and the receipts are issued by the landlord to defendant No.2. The appellate court has come to the conclusion that the shop is let out to defendant No.1 and not to defendant No.2. The appellate court came to the conclusion that defendant No.1 has no interest in the business as the business is run by defendant No.2. The appellate court came to the conclusion that defendant No.2 is in exclusive possession and, therefore, the landlord has proved the case about transfer of possession by defendant No.1 to defendant No.2. The appellate court has also relied upon the admission of defendant No.1 in his evidence that he is doing business in some other area at a different place. The appellate court has accordingly allowed the appeal and decreed the suit and directed the petitioners to hand over quiet and peaceful possession of the suit premises.

8. It is vehemently submitted by Mr.M.C. Bhatt, learned Advocate for the Applicants, that the appellate court has not discussed the evidence of the plaintiff at all, which has been dealt with by the trial court, in great detail. Mr.Bhatt submitted that, when it has come out from the evidence of the plaintiff himself that, both the brothers were doing the business from the beginning jointly, and especially when there is nothing on record to show that defendant No.1 has parted with the possession by taking any consideration, no decree on the ground of sub-letting could have been passed. It is submitted by Mr.Bhatt that, when both the brothers are doing business and even if one brother is managing the business on behalf of the other brother, it cannot be said that defendant No.1 has parted with the possession, with an intention to sub let the same to defendant No.2.

It is also argued by Mr.Bhatt that there is no partition wall in between both the shops and both the brothers are using the shop jointly and, even the Board is also common. According to him, from the very

inception, the landlord has never objected to such user by both the brothers.

9. Though served, the respondent has not cared to appear. Therefore, I have heard Mr.M.C. Bhatt, learned Advocate for the applicants. I have also gone through the Record and Proceedings.

10. It is required to be noted that, in paragraph 12, the trial court has given detailed reasons for negativing the claim of the plaintiff. It is true that the appellate court, being the final court on facts, can interfere with the said finding of fact, by re-appreciating the evidence on record. However, the first appellate court is required to decide the appeal by considering the entire evidence on record minutely. The first appellate court is the final court so far as the finding of fact is concerned. It is, therefore, expected from an appellate court to consider the evidence, in detail, as, ultimately, such finding would be treated almost as the final finding so far as the factual aspect is concerned. In the instant case, the appellate court has not said a word as to on what basis the reasoning of the trial court, by which the trial court discussed the evidence in paragraph 12, is not correct. The appellate court has not discussed the evidence of the plaintiff at all in the order. As against that, the trial court has given more weightage to the evidence of the plaintiff himself while discussing the evidence. It was expected from the appellate court, therefore, to discuss the evidence in greater detail. When the Court appreciates the evidence, the evidence is required to be appreciated in its entirety. The appellate court has not dealt with the evidence of the plaintiff at all in the judgment. Since the trial court has relied upon certain documents, it was the duty of the appellate court to discuss that part in its judgment, which is not finding a place in the entire reasoning part of the judgment of the appellate court. While reversing the judgment of the trial court, the appellate court was required to consider as to on what basis the trial court has committed the error in reaching the ultimate conclusion. Reading the judgment, it seems as if the appellate court has decided the appeal as if it is deciding the same as a trial court and, as if he is deciding the matter, for the first time, without discussing any part of the reasoning given by the trial court in the order. It is, no doubt, true that the appellate court can reverse the finding of fact recorded by the trial court, but, at least, some reasons are required to be given as to why the appellate court is not agreeing with the reasoning of the trial court, which is

also lacking in the order of the appellate court. Since the appellate court has not considered the entire evidence on record, and based his judgment only on the basis of the evidence of the defendants, in my view, the matter is required to be sent back to the appellate court for reconsidering the evidence on record and to decide the matter afresh after considering the entire evidence on record. The entire evidence would also mean "the evidence led by the plaintiff", as, ultimately, the plaintiff has gone to the court for getting decree for possession and, therefore, the evidence of the plaintiff is also crucial, which is required to be considered. While considering the matter afresh, the appellate court shall also consider the reasoning of the trial court and, ultimately, if the Court is not agreeing with such reasoning of the trial court, then, the said aspect is required to be done appropriately as to on what basis the appellate court is not agreeing with the reasoning of the trial court.

The matter is accordingly sent back to the appellate court for re-hearing the said appeal in accordance with law and on its own merits. The matter is required to be sent back mainly on the ground that the appellate court has not considered the entire evidence on record, both oral and documentary. The appellate court is assigned with an important duty to appreciate the evidence on record, as, such finding of the first appellate court would be binding even to the higher courts so far as the finding of fact arrived at by the said appellate court is concerned. In that view of the matter, the appellate court is required to consider the evidence in an appropriate manner, and, in detail, the finding is required to be given in an appropriate manner, instead of giving finding in a perfunctory manner.

The matter is accordingly sent back to the appellate court. It is, however, clarified that this Court has not expressed any opinion on the merits of the issue. It is for the appellate court to reach its own conclusion after appreciating the evidence on record as it deems fit. In short, the entire matter is at large before the appellate court and it is left to the appellate court to take appropriate decision after considering the entire evidence on record.

11. Under the circumstances, the judgment and decree passed by the Assistant Judge, Surendranagar, is set aside. The decree of the trial court is restored. The matter is sent back to the appellate court for rehearing the same in the light of the observations made in this

judgment. The appellate court shall decide the appeal again after hearing both the sides and may decide the said appeal expeditiously.

Rule is made absolute accordingly, with no order as to costs.

The record and proceedings be sent back forthwith.

11th March, 2004 (P.B. Majmudar, J.)

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(apj)